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In the Supreme Court of the United States

OCTOBER TERM, 1985

UNITED ARTISTS COMMUNICATIONS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court acted within its discretion in enjoining defendants from again participating in a type of price-fixing and customer allocation scheme that was found to be a per se violation of the Sherman Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 756 F.2d 502. The opinion of the district court (Pet. App. 12a-54a) is reported at 568 F. Supp. 134.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1985. A petition for rehearing was denied on April 22, 1985 (Pet. App. 55a). On July 25, 1985, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 1, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 5, 1980, the United States filed this antitrust suit against the operators of 90% of the first-run motion picture theater screens in the Milwaukee, Wisconsin metropolitan area. The complaint alleged that defendants participated in a type of cartel arrangement, known in the trade as a "split," that violated Section 1 of the Sherman Act, 15 U.S.C. 1. The "split" operated as follows: beginning in November 1977, defendants' executives met several times a year, reviewed a list of the movies scheduled to be released by motion picture distributors in the next few months, and then agreed on which theater would have the right to negotiate with a distributor, without competition from the others, for a license to exhibit a particular movie. By the end of each meeting, they had allocated, or "split," among themselves the negotiating rights to all major and most minor movies. Pet. App. 2a-3a. The government sought to enjoin splits in Milwaukee and nationwide (Pet. App. 53a).

2. At trial, defendants admitted the existence of the Milwaukee split (Pet. App. 23a); their main defense was that the split agreement, though opposed by distributors, was a "good" split and was a better mechanism for distributing films than the prior competitive bidding system.

Following a lengthy trial, the district court concluded that the arrangement was anticompetitive in purpose and effect, and that splits generally are anticompetitive. The court first found that defendants had allocated among themselves the rights to negotiate for films released by movie distributors (Pet. App. 23a). Their scheme also included subagreements not to bid for films, not to negotiate for any film until it was allocated, and not to negotiate for a film assigned to another member of the group (*id.* at 28a-35a). The court rejected defendants' claim that they had allocated only a "right of first negotiation" that was not anticompetitive, finding instead that "the so-called 'right of

first negotiation,' even as described by the defendants, is an impediment to price competition in the market" (*id.* at 28a-29a). Indeed, as the court explained, the practicalities of film licensing made the right of first negotiation an "empty phrase" (*id.* at 33a (footnote omitted)):

> Once a batch of films has been split, the screens for a particular period of playtime are booked up. A distributor has little chance of entering into meaningful negotiations for the licensing of a film at a theatre other than the split designee because other theatres have been designated for other films.

The district court also found that defendants formed the Milwaukee split to eliminate what they considered "excessive terms" produced by the competition that previously existed in the market (Pet. App. 24a-28a). In reaching this conclusion, the court relied largely on defendants' "damning admissions," such as their view that competition was tantamount to "murder," "rape," "extortion," and "cremation" and produced "ridiculous deals." *Id.* at 24a-27a.

The district court also found that defendants succeeded in their goal of reducing price competition. From 1977 to 1981 the number of films upon which bids were submitted fell from 317 to zero (Pet. App. 30a). Concomitantly, "guarantees"[1] dropped from $1.8 million during 1977 (pre-violation) to only $140,000 in 1981 (*id.* at 35a).[2]

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[1]"Guarantees" are minimum film rental payments that the exhibitor pays to the distributor, regardless of the film's actual box office performance (Pet. App. 15a). If a film performs below expectation, the guarantee may well exceed the distributor's percentage of the box office receipts. In this manner, the exhibitor shares with the distributor the substantial risks inherent in producing and distributing films (*id.* at 16a).

[2]In addition, the number of adjustments in film rental payments favorable to exhibitors increased, and fewer distributors earned top terms (Pet. App. 36a-37a).

Based on these findings, the district court concluded that the split constituted both price fixing and market allocation and thus was illegal per se under Section 1 of the Sherman Act. The court relied heavily on *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692-693 (1978), in which this Court held that an agreement among competitors that effectively precluded competitive bidding was "on its face" a violation of Section 1 because the ban on bidding deprived customers of the ability to compare prices in selecting services from the defendants. In a similar manner, the district court held, splits eliminate both competitive bidding and competitive negotiations, and thus deprive distributors of the ability to compare simultaneous offers (Pet. App. 42a-44a). The court also held that the split was a market allocation scheme and for that reason as well it was a per se violation of Section 1 (*id.* at 51a-53a). The court rejected defendants' argument that this Court's decision in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc. (BMI)*, 441 U.S. 1 (1979), prohibited per se condemnation of splits. Unlike the blanket licenses involved in *BMI*, split agreements do not create a new product unobtainable through individual licensing, but instead are simply a cartelization of distribution of an existing product (Pet. App. 44a-45a).[3]

Finally, the district court granted the nationwide injunctive relief prohibiting splits that the United States sought in its complaint. Relying on evidence "that the defendants are engaged in split agreements in other markets throughout the United States", the court found that "[a]lthough splits may vary in their mechanics from market to market, their

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[3]Accordingly, the court held that the Sherman Act precluded defendants' argument that splitting is superior to competition as a means for distributing films. In any event, the court noted that it had "serious doubts" that defendants were correct in asserting the potential benefits of splitting (Pet. App. 49a).

essential anticompetitive nature does not change" (Pet. App. 53a-54a).[4]

3. On appeal defendants did not challenge the district court's conclusion that the Milwaukee arrangement was a per se violation of the Sherman Act and should be enjoined (Pet. App. 5a). Rather, they argued that the district court was wrong in finding that all splits are basically the same. They claimed that "good" splits might exist elsewhere, involving only a "right of first negotiation" and thus that nationwide relief was improper (*id.* at 5a). The court of appeals unanimously affirmed (*id.* at 1a-11a). It agreed with the district court's finding that all splits, even those that purportedly involve only a "right of first negotiation", are basically anticompetitive (*id.* at 8a-9a) and are per se illegal. Accordingly, the award of nationwide injunctive relief was well within the district court's discretion (*id.* at 10a).

ARGUMENT

The entry of a nationwide injunction rests on the factual finding, concurred in by both courts below, that all splits are fundamentally anticompetitive and that in the circumstances of the film industry even a "right of first negotiation" is anticompetitive. There is no reason to review this factual issue. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Tank & Mfg. Co.* v. *Linde*, 336 U.S. 271, 275 (1949). To the extent that questions of law may be presented, the decision below is consonant with the decisions of

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[4]Defendants admitted their participation in numerous other splits nationwide (Pet. App. 53a). They did not seek discovery concerning their other splits, nor could they reasonably have done so, for they already knew their own operations. Defendants also expressly disclaimed discovery of the mechanics of other exhibitors' splits. C.A. Rec. 45, at 17-20. The district court did, however, refuse defendants' request for discovery on the limited subject of participation by *distributors* in splits nationwide (Pet. App. 10a).

this Court and of other courts of appeals and thus does not warrant further review.

1. Petitioner[5] argues that, because "good" splits that confer only a "right of first negotiation" may exist outside Milwaukee, the relief granted in this case is overly broad (Pet. i). The district court, however, rested its injunction squarely on the finding that "[a]lthough splits may vary in their mechanics from market to market, their essential anti-competitive nature does not change" (Pet. App. 53a-54a). Moreover, the court found that in the movie industry even a supposedly benign "right of first negotiation" is "an empty phrase" (Pet. App. 33a). The court of appeals agreed (*id.* at 8a-9a). In these circumstances the entry of a nationwide injunction was clearly within the court's discretion in fashioning relief. *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90 (1950) (nationwide injunction against an illegal patent license scheme used only in the East); see also *FTC* v. *Broch & Co.*, 368 U.S. 360, 363-364 (1962).

In any event, the justifications petitioner advances for hypothetical "good" splits elsewhere are precisely the justifications it advanced unsuccessfully to defend the Milwaukee arrangement. See Pet. App. 5a-6a. This argument does not warrant review because the record contains ample support for the district court's findings that all splits are basically the same as the Milwaukee scheme and that the right of first negotiation is an "empty phrase" in this industry. For example, petitioner's executive vice president, who set up the Milwaukee split, testified that petitioner's film buyers were instructed to follow common procedures in splitting films. Tr. 3904-3905, 3927; DX 506.[6] In 1979, petitioner

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[5]Only one of the defendants has sought review in this Court.

[6]Thus, petitioner is incorrect in asserting (Pet. 4 n.4) that the only evidence of splits in other markets was "by distribution company executives about splits ten to twenty years ago that did not involve these exhibitors."

participated in at least 20 splits nationwide (GX 23). The vice president of another defendant agreed at trial that his company operates splits in other cities "pretty much the same way" as in Milwaukee (Tr. 2889).

The unanimous evidence provided by motion picture distribution companies demonstrated that all splits are similar, anticompetitive, and harmful to distributors. Although in different cities "the product is split in different ways, * * * essentially a split is a split" (Tr. 1577) and all such collusive schemes are designed "to eliminate competition and * * * to reduce film rental" (Tr. 768-769). See also Tr. 678, 1292, 1268-1269, 1547, 2013, 2016.[7] Thus, there was ample basis for the district court's finding that "[o]nce a batch of films has been split, the screens for a particular period of playtime are booked up" (Pet. App. 33a).

Moreover, with respect to petitioner's contention that a "right of first negotiation" would be compatible with antitrust law, the record shows that "in reality * * * it precludes other people having the right to negotiate. * * * [It] is strictly a subterfuge and it doesn't really mean anything" (Tr. 1585-1587).

2. Petitioner's challenge to the injunction is groundless for the additional reason that even the hypothetical "good" split it posits would be illegal per se.

Petitioner concedes that a "good" split eliminates competitive bidding for film licenses: indeed, that is supposedly its virtue (Pet. 7-8). Nonetheless, it is suggested that a

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[7]The district court's finding on the similarity of splits is in accord with the only other judicial examination of splits nationwide. In *General Cinema Corp.* v. *Buena Vista Distribution Co.*, 532 F. Supp. 1244 (C.D. Cal. 1982), the district court found the basic similarity and per se illegality of splits nationwide to be so clear that it granted summary judgment and issued a nationwide injunction against splitting.

"good" split is lawful because it gives only a "right of first negotiation". By this, petitioner apparently means that if a distributor objects to negotiating with only the assigned exhibitor and demands competitive negotiation on that film, the other exhibitors have a right to compete for the film. Pet. 6.[8]

Such an agreement among independent competitors, however, amounts to unlawful interference with market forces of the kind considered by this Court in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978). Indeed, in one important respect petitioner's proposed restraint is even more anticompetitive than the arrangement struck down in *Professional Engineers*. There, although engineers agreed not to bid competitively, the customer was wholly free from the start to choose the engineer with whom he would deal. By contrast, in petitioner's "good" split the cartel takes even the initial choice of theater away from the distributor. In other respects, splits harm competition in the same ways as the restraint in *Professional Engineers*—by eliminating competitive bidding, forcing customers into a form of diminished competition, and "imped[ing] the ordinary give and take of the market place." *Id.* at 692.

Splits are also subject to per se condemnation because they divide markets among buyers, as the courts below correctly held (Pet. App. 51a-53a; 8a-9a). See *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).

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[8]At trial, defense witnesses described the Milwaukee scheme as the essence of a "good" split and testified that the customer allocations were permanent unless distributors objected, and, even if distributors did object, the allocations would last for a "reasonable amount of time" (Pet. App. 28a n.6; C.A. Rec. 162, Defendants' Proposed Findings of Fact ¶ 174).

There is no merit to petitioner's contention (Pet. 8) that the decision below conflicts with *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). There, the Court recognized that not all conduct that appears at first blush to be price-fixing is necessarily illegal per se; the agreement at issue in that case created a product that otherwise would not exist, and was therefore analyzed under the rule of reason. *Id.* at 13. See also *NCAA* v. *University of Oklahoma*, No. 83-271 (June 23, 1984), slip op. 27. Unlike the agreement in *Broadcast Music*, splits do not create a new product nor do they constitute joint productive activity. Rather, splits are horizontal agreements that restrain market forces and that have a "pernicious effect on competition and lack of any redeeming virtue." *Northern Pacific R.R.* v. *United States*, 356 U.S. 1, 5 (1958). See also R. Bork, *The Antitrust Paradox*, 268-269 (1978).

Since *Professional Engineers* dictates the holding that all splits are per se illegal, there is no merit to petitioner's claim (Pet. 5) of a conflict with the Third Circuit's decision in *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.*, 320 F.2d 285 (1963), aff'd by an equally divided Court, 378 U.S. 123 (1964). *Viking Theatre* held in unusual circumstances that a split in Philadelphia was not per se illegal. 320 F.2d at 293.[9] Subsequent court of appeals decisions have uniformly recognized the anticompetitive

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[9] *Viking Theatre* was a private antitrust damage suit by an exhibitor allegedly excluded from a local distribution scheme. The plaintiff did "not argue[] that all split systems are illegal; the substance of the plaintiff's argument is that those which do not include all exhibitors are per se illegal." 320 F.2d at 293. Thus, plaintiff complained only about its exclusion from the split. And the court of appeals affirmed the district court's dismissal of the complaint on the ground that plaintiff had failed to prove a conspiracy and failed to prove injury. *Id.* at 288.

purpose and effect of splits[10] and whatever force *Viking Theatre* may once have had, it has been superseded by *Professional Engineers*. Even less helpful to petitioner is *Greenbrier Cinemas, Inc.* v. *Attorney General*, 511 F. Supp. 1046 (W.D. Va. 1981), in which the district court held, on a truncated record, that a split in Charlottesville, Virginia, was not per se illegal. As the court below correctly observed (Pet. App. 7a), *Greenbrier* failed even to mention *Professional Engineers*, and omitted any consideration of the effect of splits on competition or price.[11]

3. Finally, even if there were any foundation for petitioner's supposition that "good" splits might exist elsewhere, the district court acted well within its discretion in

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[10]Prior to the present case the courts of appeals had considered splits principally in the context of damage actions by excluded theater owners. Not surprisingly, such plaintiffs have repeatedly failed to prove damages, for the courts have recognized that splits eliminate competition among the participating exhibitors (thus benefitting the excluded exhibitors by reducing the competition they faced) and that the motivation behind this elimination of competition is the desire to reduce film rental costs. *Admiral Theatre Corp.* v. *Douglas Theatre Co.*, 585 F.2d 877, 882, 890 (8th Cir. 1978); *Wilder Enterprises, Inc.* v. *Allied Artists Pictures Corp.*, 1979-2 Trade Cas. (CCH) ¶ 62,886, at 79,129 (E.D. Va. 1979), aff'd, rev'd and remanded in part, 632 F.2d 1135 (4th Cir. 1980); *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971); *Royster Drive-in Theatres, Inc.* v. *American Broadcasting-Paramount Theatres, Inc.*, 268 F.2d 246, 250 (2d Cir.), cert. denied, 361 U.S. 885 (1959); *Seago* v. *North Carolina Theatres, Inc.*, 42 F.R.D. 627, 638 (E.D.N.C. 1966), aff'd per curiam, 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968). *Cinema-Tex Enterprises, Inc.* v. *Santikos Theatres, Inc.*, 414 F. Supp. 640 (W.D. Tex. 1975), aff'd and rev'd in part, 535 F.2d 932 (5th Cir. 1976). See also *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 198, 204-205 (9th Cir.) cert. denied, 379 U.S. 880 (1964).

[11]*Greenbrier* was a declaratory judgment action by an exhibitor challenging a Department of Justice press release, and, contrary to petitioner's assertion (Pet. 6), the United States never filed a complaint in the case. The opinion was rendered after a three-day trial on an unusual stipulation that there would be no evidence of the purpose or effect of the Charlottesville split.

enjoining the petitioners from participating in such arrangements. "The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court." *Associated Press* v. *United States*, 326 U.S. 1, 22 (1945). See *Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 473 (1960). In discharging the responsibility to formulate effective remedies, the district court's function "does not end with enjoining continuance of the unlawful restraints" (*United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 171 (1948)), and is "not limited to prohibition of the proven means by which the evil was accomplished. Acts entirely proper when viewed alone may be prohibited." *United States* v. *United States Gypsum Co.*, 340 U.S. at 88-89 (footnote omitted). In *United States* v. *Loew's, Inc.*, 371 U.S. 38, 41, 52-56 (1962), the district court found that only some of the contested licensing agreements were unlawful, and this Court upheld—indeed broadened—a decree enjoining defendants from repeating their unlawful conduct. In the present case the district similarly took the unremarkable step of directing the defendants not to engage again in conduct found to violate the law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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